Petition

81-1650

No.

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CLERK

In the Supreme Court of the United States

October Term, 1981

CITY OF CINCINNATI,
Petitioner,

vs.

ALAN R. JONES, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that a party to an action be given notice of the filing of a judgment entry.

2. Whether when a state grants an appeal as of right from the judgment of a trial court due process under the Fourteenth Amendment to the United States Constitution requires that a party be given timely notice of a judgment entry in order to be given an opportunity to perfect such an appeal.

LIST OF PARTIES

Petitioner:

CITY OF CINCINNATI

Respondents:

ALAN R. JONES, GILBERT FLICK, STEVE WONG, DEAN M. WARD and GUY T. ENGELBERT

TABLE OF CONTENTS

QUESTIONS PRESENTED I
LIST OF PARTIES II
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 6
REASONS FOR GRANTING THE WRIT 8

1. Due Process of Law Demands That a Party Be Given Notice of a Judgment Entry 8
2. Notice of a Decision Is As Essential to Due Process As Notice of a Proceeding and Opportunity to Be Heard 9
3. When a State Grants an Appeal As of Right From the Judgment of a Trial Court Due Process Under the Fourteenth Amendment to the United States Constitution Requires That a Party Be Given Timely Notice of a Judgment Entry in Order to Be Given an Opportunity to Perfect Such an Appeal 10

CONCLUSION 12

APPENDIX:

Order of the Supreme Court of Ohio Dismissing the Appeal (December 9, 1981) A1
Order of the Supreme Court of Ohio Overruling Motion to Certify the Record (December 9, 1981) A2
Decision of the Court of Appeals (September 2, 1981) A3

TABLE OF AUTHORITIES

Cases

American Surety Company v. Baldwin, 287 U.S. 156 (1932) 9

Centers, Inc. v. Abraham, 46 Ohio App. 2d 262, 348 N.E.2d 741 (1975) 8

Fawick Airflex Co. v. United Electrical R. & M. W., 56 Ohio L. Abs. 65, 90 N.E.2d 610 (1950) 8

Goldberg v. Kelley, 397 U.S. 254 (1970) 11

Lindsey v. Normet, 405 U.S. 56 (1972) 10

Mullane v. Central Hanover Bank & Trust Co., et al., 339 U.S. 306 (1950) 9

Randolph v. First Baptist Church of Lockland, 68 Ohio L. Abs. 100, 120 N.E.2d 485 (1954) 9

Constitutional Provisions, Statutes and Rules

Ohio R. App., P.:

Rule 3(A) 5, 11

Rule 4(A) 5, 8, 10

Ohio R. Civ. P.:

Rule 54(A) 2

Rule 58 3

Rule 60(B) 3

Rules of the Court of Common Pleas, Hamilton County, Rule 17(A) 4

U. S. Const., Amend. XIV 2, 9, 10

28 U.S.C. §1257(3) 2

Texts

16A CORPUS JURIS SECUNDUM 844, *Constitutional Law*, §626 8
16A AM. JUR. 2d 1081, *Constitutional Law*, §859 10
17 O. JUR. 3d 215, *Constitutional Law*, §678 8

No.

In the Supreme Court of the United States

October Term, 1981

CITY OF CINCINNATI,
Petitioner,

vs.

ALAN R. JONES, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

The petitioner, City of Cincinnati, respectfully prays that a writ of certiorari issue to review the denial of the Motion for an Order Directing the Court of Appeals for Hamilton County to Certify its Record and dismissal of the appeal to the Supreme Court of Ohio entered in this proceeding on December 9, 1981.

OPINIONS BELOW

The dismissal of the Supreme Court of Ohio, the entry overruling the motion for an order directing the Court of Appeals for Hamilton County to certify its record by the Supreme Court of Ohio and the Decision by the Court of Appeals for Hamilton County appear in the appendix hereto.

JURISDICTION

The Supreme Court of Ohio overruled the City of Cincinnati's Motion for an Order Directing the Court of Appeals for Hamilton County to Certify its record and sua sponte dismissed the appeal on December 9, 1981. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Rules of Civil Procedure Rule 54(A), Judgments; Costs:

> "(A) Definition; form. 'Judgment' as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a referee or the record of prior proceedings."

Ohio Rules of Civil Procedure Rule 58, Entry of Judgment:

> "Subject to the provisions of Rule 54(B), upon a general verdict of a jury, or upon a decision announced, the court shall promptly cause the judgment to be prepared and, the court having signed it, the clerk shall thereupon enter it. A judgment is effective only when filed with the clerk for journalization. Entry of the judgment shall not be delayed for the taxing of costs."

Ohio Rules of Civil Procedure Rule 60(B), Relief from Judgment or Order:

> "(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken.

A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules."

Rules of the Court of Common Pleas, Hamilton County, Rule 17(A), Journal Entries:

"(A) Unless the Court otherwise directs, counsel for the party in whose favor an order, judgment, or decree has been granted in a civil case, shall prepare a proper journal entry within ten days thereafter unless the time be extended by the Court and submit the same to counsel of the opposite party, who shall approve or reject the same within three days after its receipt by him. In case of rejection opposing counsel may file objections thereto in writing with the Court.

The judgment entry specified in Civil Rule 58 shall be journalized by the Clerk of Courts on the same day of the verdict decree or decision. If such entry is not prepared and presented for journalization by counsel then it shall be prepared and journalized by the Court.

The Court shall approve a journal entry deemed by it to be proper, sign the same and cause it to be filed with the Clerk of Courts. Notice of the filing of each journal entry for the journalization shall on the following day of such filing be published in the Cincinnati Court Index."

Ohio Rules of Appellate Procedure, Rule 3(A), Appeal as of Right—How Taken:

"(A) Filing the notice of appeal. An appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by leave of court shall be taken in the manner prescribed by Rule 5."

Ohio Rules of Appellate Procedure, Rule 4(A), Appeal as of Right—When Taken:

"(A) Appeals in civil cases. In a civil case the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed from. A notice of appeal filed before entry of such judgment or order shall be treated as filed after such entry and on the day thereof. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is suspended as to all parties by a timely motion filed in the trial court by any party pursuant to the Civil Rules hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry

of the last of any of the following orders made upon a timely motion under such rules granting or denying a motion (1) for judgment under Rule 50(B); (2) for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is filed with the clerk of the trial court for journalization."

STATEMENT OF THE CASE

The respondents, police cadets Alan R. Jones, Gilbert Flick, Steven Wong, Dean M. Ward, and Guy T. Engelbert, filed a Complaint in Common Pleas Court alleging among other claims breach of contract by the petitioner, City of Cincinnati. The respondents claimed that they were entitled to additional compensation from the city. The City of Cincinnati denied that the respondent police cadets were entitled to additional compensation for the time worked since the respondents were permanent full-time civil service employees (40 hours per week plus fringe benefits) who had been paid for 40 hours per week for 52 weeks including vacation, sick leave, overtime and shift differential.

After numerous reports and trial settings this case came on for trial on October 11, 1979. The case was tried to the court which lasted about three hours. After the completion of the trial the visiting judge requested post trial briefs by October 13, 1979 and took the matter under submission.

On October 26, 1979, the court entered judgment against the petitioner and placed an Entry of record granting judgment to the respondent police cadets without notice to the attorneys for the petitioner or respondents or their representatives. Unknown to and unseen by either attor-

ney in this case, the Cincinnati Court Index Press on October 30, 1979 showed that an entry had been journalized in this case. On January 15, 1980, counsel for the respondents and the petitioner learned of the Entry, fifty days after the Notice of Appeal was required to be filed.

A Motion for Relief from Judgment, Rule 60(B) was filed and denied by the trial court. Two notices of appeal were filed with the Court of Appeals for the First Appellate District of Ohio, one, for the October 26, 1979 Entry and the second, for the denial of the Motion for Relief from Judgment.

The First Appellate District for Ohio dismissed the appeal for the October 26, 1979 Entry, and a Motion for an Order Directing the Court of Appeals for Hamilton County to Certify its Record was filed with the Supreme Court of Ohio.

On January 30, 1981 the Supreme Court of Ohio overruled the Motion to Certify and sua sponte dismissed the appeal. On April 28, 1981, a Petition for a Writ of Certiorari to the Supreme Court of Ohio was docketed in the Supreme Court of the United States as No. 80-1814. On June 15, 1981 the Petition for a Writ of Certiorari was denied.

The First Appellate District for Ohio on September 2, 1981 affirmed the trial court's denial of the Motion for Relief from Judgment and a Motion for an Order Directing the Court of Appeals for Hamilton County to Certify the Record was filed with the Supreme Court of Ohio.

On December 9, 1981 the Supreme Court of Ohio overruled the Motion to Certify and sua sponte dismissed the appeal. It is from this dismissal that this Petition for a Writ of Certiorari is sought.

REASONS FOR GRANTING THE WRIT

1. Due Process of Law Demands That a Party Be Given Notice of a Judgment Entry.

Ohio courts adhere to the principle that there is no right for a party to be given notice of the filing of a judgment entry. The current law in Ohio is:

> "There is no requirement under the Ohio Rules of Civil Procedure to give a party to an action notice of the filing of the judgment entry and such a failure does not deny him due process of law." *Centers, Inc. v. Abraham,* 46 Ohio App. 2d 262, 348 N.E.2d 741 (1975).

This is consistent with a prevailing view in Ohio, "The right of appeal is not an essential constituent of due process of law." *Fawick Airflex Co. v. United Electrical R. & M. W.,* 56 Ohio L. Abs. 65, 90 N.E.2d 610 (1950); 17 O. JUR. 3d 215, *Constitutional Law,* Section 678. The same general principle, "An appellate review in civil cases is not an essential requirement of due process of law in the absence of constitutional or statutory provisions to the contrary" is the prevailing law in this country. 16A CORPUS JURIS SECUNDUM 844, *Constitutional Law,* Section 626.

Although it is not a denial of due process when a court fails to give a party notice of a judgment entry, Rule 4(A) of the Ohio Rules of Appellate Procedure and Ohio case law hold in spite of lack of notice failure to file a notice of appeal within thirty days of such judgment entry is a jurisdictional defect. The result—Ohio appellate courts sua sponte dismiss the appeal as a matter of law.

The Supreme Court of the United States in an opinion written by Mr. Justice Brandeis suggested that "Entry of

of judgment without notice may be a denial of due process, even where there is jurisdiction over the person and subject matter." *American Surety Company v. Baldwin,* 287 U.S. 156, 168 (1932). Although the Supreme Court extended the Fourteenth Amendment "due process of law" provisions in *Mullane v. Central Hanover Bank & Trust Co., et al.,* 339 U.S. 306 (1950), the court has not to date extended nor formalized Justice Brandeis' suggestion—Entry of judgment without notice is a denial of due process of law. It is time for the Court to recognize that due process of law under the Fourteenth Amendment demands that notice be given of a judgment entry.

2. Notice of a Decision Is As Essential to Due Process As Notice of a Proceeding and Opportunity to Be Heard.

In Ohio the courts have provided safeguards for persons in regard to due process rights of notice and opportunity to be heard. The Ohio courts have even extended this right of notice and opportunity to be heard to churches when expelling members. *Randolph v. First Baptist Church of Lockland,* 68 Ohio L. Abs. 100, 120 N.E.2d 485 (1954). However, Ohio law does not require that notice be given of the decision. It might be said, What does it profit a man to gain the whole world of due process rights of notice and opportunity to be heard, only to lose his right to appeal through lack of notice of an adverse decision not protected by due process of law?

In this action the City of Cincinnati filed an Answer, appeared in court on numerous occasions, attended depositions, and participated in all parts of the litigation including trial and post trial briefs, but never received nor did the court send any notice of the decision or judgment entry filed by the judge himself. As a result the City of Cin-

cinnati lost all rights of appeal. Rule 4(A) of the Ohio Appellate Rules provides that an appeal must be perfected within thirty days of the filing of the judgment entry or the appellate court lacks jurisdiction to hear the appeal. Despite the City of Cincinnati's diligent and vigorous defense of the action, the decision became "Appeal Proof" by the court failing to provide any direct communication or notice to either party or their attorneys in this action. The City of Cincinnati was accordingly denied due process of law under the Fourteenth Amendment to the United States Constitution by the trial court's failure to provide it with notice of its judgment entry.

The City of Cincinnati submits that Ohio courts will continue to decree "Appeal Proof" decisions unless there is a recognition by the Supreme Court of the United States that notice of a decision is as essential to due process as notice of a proceeding and opportunity to be heard.

3. When a State Grants an Appeal As of Right From the Judgment of a Trial Court Due Process Under the Fourteenth Amendment to the United States Constitution Requires That a Party Be Given Timely Notice of a Judgment Entry in Order to Be Given an Opportunity to Perfect Such an Appeal.

The general rule in Ohio as well as in the federal system is that due process does not require notice of a judgment entry. The rationale behind this holding seems to be that because due process does not, once a party has been given one full and fair hearing on the merits, require a state to provide appellate review, *Lindsey v. Normet*, 405 U.S. 56 (1972); 16A AM. JUR. 2d 1081, *Constitutional Law*, Section 859, neither then does due process require notice

of a judgment entry in order to perfect an appeal which is given as a matter of statutory privilege.

This rationale does not fit, and the courts have not addressed, the situation where an appeal is given by a state as a matter of right rather than as a matter of discretion. In Ohio an appeal is given as a matter of right from the judgment of a trial court upon the condition only that a timely notice of appeal be filed with the clerk of the trial court. Ohio R. App. P., Rule 3(A). In this instance when an appeal is given as a matter of right, due process guarantees should attach and require the trial court give notice of a judgment entry to allow a party the opportunity to perfect that appeal.

This situation is analogous to the interplay of due process in the administrative field. Certainly a welfare recipient has no constitutional right to receive assistance payments from the government, just as a party has no constitutional right to an appeal from a trial court's decision. However, when a state acts to give such welfare payments to an individual, due process guarantees attach to require that notice and an evidentiary hearing be given to such an individual prior to the termination of the receipt of such payments. *Goldberg v. Kelley,* 397 U.S. 254 (1970). Accordingly, due process guarantees should attach when a state acts to give a party a right of appeal from the decision of a trial court and require that notice be given of a judgment entry in order that such an appeal might be perfected. In the first instance the state is giving a property interest that cannot be taken without due process guarantees. In the second instance, the state is giving a liberty interest which is likewise protected by the due process clause. The State of Ohio has acted to give parties a right of appeal from the judgment of a trial court, and that being done due process and traditional no-

tions of fair play and substantial justice require that such parties be given notice of the court's judgment entry in order to allow the party an opportunity to perfect such an appeal.

CONCLUSION

Over the years the courts have recognized due process rights in all walks of life. With the expansion of rights to notice and opportunity to be heard came expanded justice and fair play to many who otherwise would have been denied such rights. Now, the time has come to likewise expand the rights to notice of decisions including judgment entries and final appealable orders of courts and expand justice and fair play to those who use the courts to redress their differences.

Respectfully submitted,

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Appendix

APPENDIX

ORDER OF THE SUPREME COURT OF OHIO DISMISSING THE APPEAL

(Dated December 9, 1981)

No. 81-1621

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

ALAN R. JONES, *et al.*,
Appellees,

vs.

CITY OF CINCINNATI, *et al.*,
Appellants.

APPEAL FROM THE COURT OF APPEALS
FOR HAMILTON COUNTY

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY THE RECORD

(Dated December 9, 1981)

No. 81-1621

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

ALAN R. JONES, *et al.*,
Appellees,

vs.

CITY OF CINCINNATI, *et al.*,
Appellants.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR HAMILTON COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

DECISION OF THE COURT OF APPEALS

(September 2, 1981)

No. C-800623

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ALAN R. JONES, GILBERT FLICK, STEVEN WONG, DEAN M. WARD, and GUY T. ENGELBERT,
Plaintiffs-Appellees,

vs.

CITY OF CINCINNATI, WILLIAM V. DONALDSON, City Manager, and F. A. DAWSON, Finance Director,
Defendants-Appellants.

DECISION

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the assignment of error, the briefs and the arguments of counsel.

The plaintiffs-appellees, at the time police cadets of the City of Cincinnati, filed a complaint against the defendants-appellants for additional compensation said to be due them as a result of their employment by the City. The case was tried to a visiting judge on assignment to the Common Pleas Court of this county, and, after trial to the court, was taken under consideration. Several weeks later,

and without other direct communication with either counsel, the trial judge himself prepared and placed of record a memorandum opinion and judgment entry. Four days later, on October 30, 1979, it is conceded (T.p. 2, 9) that a notice appeared in the Cincinnati Court Index, the official organ for legal publications,[1] indicating that an entry and memorandum opinion had been placed of record on October 26, 1979, in the instant case. Although it is a customary, unwritten practice to mail notice of a judgment entry entered by a visiting judge to all counsel concerned, such notice was apparently not sent to counsel in the instant case, and appellants argue that they were unaware of the entry of judgment on October 26th, and were, as a result, precluded from filing a timely notice of appeal therefrom. Nevertheless, a direct appeal was attempted by appellants and was dismissed by this Court as not timely filed pursuant to App. R. 4 (A). *Jones v. City of Cincinnati*, No. C-800622 (1st Dist. Oct. 16, 1980). *See Kauder v. Kauder* (1974), 38 Ohio St. 2d 265, 313 N.E.2d 797.

On July 2, 1980, appellants filed in the trial court a motion for relief from judgment pursuant to Civ. R. 60(B). Various affidavits[2] were submitted pro and contra, and on August 4, 1980, the trial court overruled the motion, hold-

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1. "Publication in the Cincinnati Court Index shall be deemed official and complete notification to all Hamilton County counsel of any assignment or setting of any case for any purpose whatever and it shall be the duty of such counsel to ascertain from the Cincinnati Court Index any Official notification contained therein pertaining to all cases." Rules of Common Pleas, Hamilton County, Rule 6(C).

2. For reasons difficult to fathom, these affidavits were not included as part of the record. They are attached to counsel's brief which does not, of course, raise them to a level allowing us to consider them. As a consequence, all factual references herein are derived solely from recitals contained in the index of docket entries, and from the transcript of proceedings on July 18, 1980, which together constitute virtually the entire record in this cause.

ing that no 60(B) grounds for relief had been shown, and that the sole reason for desiring relief from judgment was to permit a timely appeal from the judgment. Appeal from the overruling of this order was timely filed, with a single assignment of error presented for review: that the trial court erred in denying the motion for relief from judgment pursuant to Civ. R. 60(B). We disagree and affirm.

It is patently clear that appellants demonstrated no basis under Civ. R. 60(B) for relief from judgment. There was no mistake, inadvertence, surprise, or excusable neglect, or other reason adduced justifying relief from judgment. Appellants' quarrel with the judgment was *solely on matters of law* which they wished to pursue upon appeal. Appellants candidly concede that the motion was attempted in order "to obtain the right of appeal." (Appellants' Brief, p. 7.) The rule is simply unavailable for such purpose; it may not be used to extend the time for filing an appeal. *McCue v. Buckeye Ins. Co.* (8th Dist. 1979), 61 Ohio App. 2d 101, 399 N.E.2d 127; *Taray v. Sadoff* (1st Dist. 1974), 71 Ohio Ops. 2d 203, 331 N.E.2d 448.

Appellants argue, alternately, that the entry of judgment against them without actual direct notice thereof to counsel deprived them of their Fourteenth Amendment right to due process of law. We find no support for this principle in law. The rule, so far as we are aware, is to the contrary, and is well-stated in the syllabus by the court in *Town & Country Drive-In Shopping Centers, Inc. v. Abraham* (10th Dist. 1975), 46 Ohio App. 2d 262, 348 N.E.2d 741, 742:

> There is no requirement under the Ohio Rules of Civil Procedure to give a party to an action notice of the filing of the judgment entry and such a failure does not deprive him due process of law.

Here, there is no suggestion that the procedure for entry of the judgment was otherwise than as prescribed in Civ. R. 58, which provides, in relevant part:

> . . . upon a decision announced, the court shall promptly cause the judgment to be prepared and, the court having signed it, the clerk shall thereupon enter it. A judgment is effective only when filed with the clerk for journalization. . . .

Not only was this accomplished, but notice thereof was additionally placed in the publication duly designated by local rule as the official organ for legal notices. The instant procedure satisfied due process of law.

Appellant argues nevertheless that the trial court failed to comply with local Rule 17, which provides for the preparation of judgment entries by the prevailing party and the submission thereof to the opposite party, before submission to the court for approval and journalization by the clerk. However, even assuming this rule could elevate the procedure to the level of a constitutional issue, the rule does *not* preclude the court from drafting and entering its own judgment entry, if it elects to do so. Rule 17(A) begins with the wording "Unless the Court otherwise directs, . . ." Here, the court obviously directed its own initiative, and no reason whatsoever exists to prevent its having done so.

The assignment of error is without merit, is accordingly overruled, and the judgment is affirmed.

PALMER, *P. J.*, DOAN and KLUSMEIER, *JJ.*

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

Opposition

Supreme Court, U.S.
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 3
ARGUMENT 3
CONCLUSION 7

TABLE OF AUTHORITIES

Cases

American Surety Company v. Baldwin, 287 U.S. 156 (1932) 4
Mullane v. Central Hanover Bank & Trust Co., et al., 339 U.S. 306 (1950) 4
Goldberg v. Kelley, 397 U.S. 254 (1970) 6

Constitutional Provisions, Statutes and Rules

Ohio R. App. P., Rule 4(A) 4, 7
Rules of the Court of Common Pleas, Hamilton County,
Rule 6 ..... 1, 4, 5, 6
Rule 17 ..... 4, 5, 6
U. S. Const., Amend. XIV 4, 6, 7

No. 81-1650

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CITY OF CINCINNATI,
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those Constitutional and Statutory Provisions stated at page 2 of the Petition for a Writ of Certiorari, Respondents consider pertinent the following:

Rules of the Court of Common Pleas, Hamilton County, Ohio, eff. March, 1976, Rule 6:

> "(A) The Cincinnati Court Index is hereby designated as the official daily law journal of this Court, as required by Revised Code Section 2701.09, in which the individual calendars of the judges of this Court

shall be published, which calendars shall contain the numbers and titles of cases, and the individual names of the trial attorneys appearing therein as defined by Superintendence Rule 3 and Rule 10 of these Rules. The calendars shall also contain the motions dockets and such particulars and notices respecting causes, as may be specified by the judges of this Court, and each notice required to be published by any of such judges.

"(B) In accordance with the individual assignment system required by Superintendence Rule 4, separate calendars for each judge of each division of this Court shall be published.

"(C) Publication in the Cincinnati Court Index shall be deemed official and complete notification to all Hamilton County counsel of any assignment or setting of any case for any purpose whatever and it shall be the duty of such counsel to ascertain from the Cincinnati Court Index any official notification contained therein pertaining to all cases.

"(D) Where mail notification is provided by these rules or is otherwise given, nondelivery of such mail notification shall not excuse the nonappearance of Hamilton County counsel where such notice has also been given by publication in the Cincinnati Court Index as provided by the paragraph above.

"(E) Notwithstanding provisions of any rule to the contrary, any mail notification provided for shall be sufficient if it specifically directs the attention of counsel to the official notification in the Cincinnati Court Index without particularly setting forth any specific case style or number or exact time of hearing."

STATEMENT OF THE CASE

Respondents consider the following amplification of the Statement of the Case, as contained at page 6 of the Petition for a Writ of Certiorari to be appropriate:

Reference to the Judgment Entry and Memorandum Opinion entered by the Trial Court on October 26, 1979, was published in the Cincinnati Court Index Press, the official daily law journal of the Hamilton County Common Pleas Court, on October 27, 1979, in the following form:

JUDGE RILEY

Friday, October 26.

A-7608395 Jones vs. City of Cinti Entry.

A-7608395 Same vs. Same. Memorandum Opinion.

ARGUMENT

1. Due Process of Law Does Not Require the Rendering of Actual Notice to the Parties and Counsel of a Judgment Entry and Memorandum Opinion.

As indicated at page 7 of the Petition for a Writ of Certiorari, on April 28, 1981, a Petition for a Writ of Certiorari to the Supreme Court of Ohio was docketed in the Supreme Court of the United States as No. 80-1814, and on June 15, 1981, the Petition for a Writ of Certiorari was denied. The positions taken at pages 8 and 9 of Petitioner's instant Petition for a Writ of Certiorari were essentially similar to those addressed in the Petition for a Writ of Certiorari which was subsequently denied by this Court on

June 15, 1981, and Respondents' reply thereto is essentially similar to the reply offered in No. 80-1814.

The absence of *actual* notice of the journalization by the Trial Court of its own Judgment Entry and Memorandum Opinion within the time required to perfect an appeal under Rule 4(A) of the Ohio Rules of Appellate Procedure is the gravamen of Petitioner's claim that it has been denied due process of law. Petitioner cites *American Surety Company v. Baldwin*, 287 U.S. 156, 168 (1932) and *Mullane v. Central Hanover Bank & Trust Co., et al.*, 339 U.S. 306 (1950) in support of this proposition. However, in neither *American Surety Company, supra,* nor *Mullane, supra,* does it appear that notice by publication in the Court's official daily law journal or a newspaper of general circulation was consummated the day following journalization of the Court's entry and decision. In the case *sub judice,* it is clear that, pursuant to Hamilton County Common Pleas Court Local Rule 6 and Local Rule 17, publication in the Cincinnati Court Index of the Trial Court's Judgment Entry and Memorandum Opinion was made the day following journalization of the Court's Entry and that this constituted "notice" to the parties of the Court's action. If due process required *actual* notice of the journalization of a Judgment Entry from which an appeal might be taken, in order for the time for perfecting an appeal to commence, there would be virtually no finality to litigation. The Fourteenth Amendment and Due Process of Law provisions therein do not require actual notice of a judgment entry within the time for perfecting an appeal therefrom, but simply that there be some reasonable means of providing the parties with constructive notice of the Court's decision within such time as would entitle the parties to appeal if such is sought. The publication in the Cincinnati Court Index Press, Hamilton County Common Pleas Court's of-

ficial daily law journal, of the Entry and Memorandum Opinion journalized by the Court one day after the journalization thereof is adequate notice to the parties so as to comport with due process requirements, and is a reasonable means of furnishing constructive if not actual notice to the litigants so that the rights of appeal may be pursued if appropriate.

Petitioner suggests that the Trial Court's decision "became 'appeal proof' by the Court failing to provide any communication or notice to either party or their attorneys in this action." (Page 10 of Petition.) However, it is quite clear that the Trial Court in fact did communicate notice of its decision and entry in accordance with Local Rule 17:

> "Notice of the filing of each journal entry for the journalization shall on the following day of such filing be published in the Cincinnati Court Index . . ."

It is difficult to perceive an "appeal proof" decision when notification of journalization thereof is published in the official daily law journal of the Court which, by Local Rule 6, shall be deemed official and complete notification to all Hamilton County counsel

> ". . . for any purpose whatever and it shall be the duty of such counsel to ascertain from the Cincinnati Court Index any official notification contained therein pertaining to all cases . . ."

on the day following journalization by the Court of the Judgment Entry and Memorandum Opinion, and when there remained twenty-nine (29) days for the filing of a Notice of Appeal therefrom in order for Petitioner to obtain Appellate review thereof.

In addition to those reasons for granting the Writ of Certiorari which were presented in No. 80-1814 (Petition

for Writ of Certiorari - Denied June 15, 1981), Petitioner in the instant Petition for Writ of Certiorari proposes that due process under the Fourteenth Amendment requires notice of a judgment entry in instances wherein an appeal therefrom is available as a matter of right (page 10 of Petition). As has been previously stated, the parties hereto had notice of the Court's action by virtue of publication in the official daily law journal of the Court, but, apparently, Petitioner did not notice this publication and, consequently, had no *actual* notice of the Court's decision within the time for perfection of an appeal therefrom. Respondents submit that constructive notice of the Court's decision via publication in the Cincinnati Court Index Press is a reasonable means of affording counsel and parties of notice of the Court's actions and *actual* notice to all counsel and parties of the Court's decision is not necessary so as to comport with due process requirements of the Fourteenth Amendment of the United States Constitution.

Petitioner cites *Goldberg v. Kelley,* 397 U.S. 254 (1970), at page 11 of the Petition, presumably as authority for the proposition that *actual* notice of the Court's decision in the case *sub judice* is required to satisfy due process under the Fourteenth Amendment. Respondents' review of *Goldberg, supra,* suggests that it is easily distinguishable from the circumstances at bar, both upon its facts and in view of the reasonable means employed by the Court pursuant to Local Rules 6 and 17(A) to publish notification of the Court's decision in the Cincinnati Court Index Press, which, we submit, satisfies the due process guarantees under the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Petitioners have not been deprived of any Constitutional rights or remedies by virtue of the publication of journalization of the Court's Judgment Entry and Memorandum Opinion in the official daily law journal of the Court on the day following journalization thereof and there is no requirement under the Fourteenth Amendment that *actual notice* of the Court's journalization of its own Entry be afforded to the parties. If *actual* notice to all parties were required in order to commence the time for the filing of an appeal there would be virtually a limitless time in which appeals could be taken in those situations where mail is lost, misdelivered, or misaddressed, and the appellant claims lack of notice which cannot be rebutted by appellee. A far more practical means of affording notice to the parties is through the Court's official daily law journal, a newspaper which is readily available to all practicing attorneys in Hamilton County, Ohio, so that an appeal may be perfected within the time constraints of Rule 4(A) of the Ohio Rules of Appellate Procedure. The fact that the parties inadvertently overlooked such notification and as a result were unable to perfect an appeal within the time specified in Rule 4(A) of the Ohio Rules of Appellate Practice is indeed regrettable, but cannot constitute the basis for a claim of Constitutional infringement.

Respectfully submitted,

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